

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:11-CR-80-F1

UNITED STATES OF AMERICA

v.

JUAN CARLOS VELASQUEZ-PENUELAS,
Defendant.

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ORDER

This matter is before the court on Juan Carlos Velasquez-Penuelas's pro se letter motion [DE-36], which was received in chambers on January 25, 2013. Velasquez-Penuelas's motion, which is titled "[m]otion pursuant § 5K3.1 'Fast Track Law,'" argues that under 18 U.S.C. § 3553(a) the court should have imposed a lower sentence to avoid sentencing disparities caused by U.S. Sentencing Guidelines § 5K3.1.

Velasquez-Penuelas, a native and citizen of Mexico, pled guilty to illegal reentry by an aggravated felon, in violation of 8 U.S.C. §§ 1326(a) and (b)(2). His guideline imprisonment range was substantially increased by a sixteen-level enhancement, which he received because he had previously been deported or unlawfully remained in the United States after a conviction for a felony drug trafficking offense. He was sentenced on January 4, 2012 to a term of 70 months imprisonment, at the bottom of his advisory sentencing range. *See* Judgment [DE-25]. He appealed to the Fourth Circuit, raising a claim of procedural error at sentencing, but the Fourth Circuit affirmed. [DE-34].

Because Velasquez-Penuelas's motion challenges the legality of the court's sentence, the motion should be brought pursuant to 28 U.S.C. § 2255 and the court proposes to re-characterize

Velasquez-Penuelas's letter as a § 2255 motion. A § 2255 collateral attack on a conviction or sentence must be filed on the appropriate form. Rule 2, Rules Governing § 2255 proceedings; Local Civil Rule 81.2 (E.D.N.C.). If Velasquez-Penuelas chooses to file an amended § 2255 motion, he must re-submit his motion on the appropriate form. The Clerk of Court is DIRECTED to forward a copy of the appropriate form to Velasquez-Penuelas at his last known address.

In addition, because the court proposes to re-characterize the motion as a § 2255 collateral attack on Velasquez-Penuelas's sentence, the court provides the following notice, in keeping with *Castro v. United States*, 540 U.S. 375 (2003) and *United States v. Blackstock*, 513 F.3d 128 (4th Cir. 2008):

NOTICE OF INTENT TO CHARACTERIZE FILING AS A § 2255 MOTION

Mr. Velasquez-Penuelas, you are advised that the court intends to characterize your letter motion as a § 2255 collateral attack on your conviction. After you receive this notice, you may choose to withdraw your letter or file an amended motion on the appropriate § 2255 form. If you choose to file an amended § 2255 motion on the appropriate form, *you must include all the challenges to your conviction or sentence that you wish to raise, including but not limited to the challenges set forth in your letter motion.* United States law places restrictions on the number of § 2255 motions a prisoner may file, and, subject to certain narrow exceptions, prisoners are generally prohibited from filing second or successive § 2255 motions. For this reason, you must include all of the challenges to you conviction or sentence in your first § 2255 motion because you will likely be prohibited from filing additional § 2255 motions. The motion should include

all of the challenges raised in your letter to the court regarding the fast track law, as well as any other challenges you wish to raise.

CONCLUSION

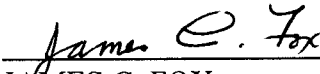
The Clerk of Court is DIRECTED to forward a copy of the appropriate § 2255 form, along with a copy of this order, to Velasquez-Penuelas at his last known address. **If Velasquez-Penuelas chooses to file an amended § 2255 motion, he is DIRECTED to return the form, in accordance with these instructions, within twenty-eight (28) days from the filing of this order. Failure to do so may result in the dismissal of this action or the striking of the motion.**

Send the original of the § 2255 form to:

Clerk of Court
United States District Court, E.D.N.C.
ATTN: Prisoner Litigation Division
P.O. Box 25670
Raleigh, NC 27611

SO ORDERED.

This the 1st day of October, 2013.



JAMES C. FOX
Senior United States District Judge